SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM 1962

No. 735

NORTH TEXAS PRODUCERS ASSOCIATION,
Petitioner,

versus

KEITH YOUNG,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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North Texas Producers Association, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on September 13, 1962.

OPINIONS BELOW

The Opinion of the Court of Appeals (*infra*, Appendix A, page 19) is reported at 308 F. 2d 235 (5th Cir., 1962). The per curiam Opinion denying rehearing is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on the 13th day of September, 1962 (*infra*, Appendix B, page 43). A Petition for Rehearing duly filed was de-

nied on October 17, 1962 (*infra*, Appendix C, page 47). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Section 1254(1).

QUESTIONS PRESENTED

Point I.

(1) Where a milk cooperative controlling most of the milk in the Dallas area is charged with conspiracy to breach a contract to deliver **bottled milk** to plaintiff, is it a defense to a Sherman Act treble damage suit that:

(a) Defendant bottled for no other customer; and

(b) Defendant was at all times ready, willing and able to deliver milk in bulk to plaintiff on the same terms and conditions as defendant delivered **to each and every other customer**; and

(c) Defendant did **so deliver** bulk milk to plaintiff during the period for which damages were allowed; and

(d) The bottling contract breached, if carried out, would plainly have constituted a subsidy in favor of plaintiff over and against every other customer of defendant.

(2) Whether under the foregoing set of facts, plaintiff's sole remedy is not an action for breach of contract in the State Court, which action is presently pending.

(3) Whether an alleged monopolist should be held liable for treble damages for conspiracy to refuse to give one customer preferential treatment over another.

Point II.

(4) In a suit involving alleged damages for breach of a contract to bottle milk, where plaintiff claimed as damages the difference between the contract cost and his **actual** bottling cost, whether he is relieved from showing his actual bottling costs merely by virtue of defendant's alleged violation of the Sherman Law.

(5) Whether a plaintiff in a treble damage suit is relieved from proving his damages reliably, when this was clearly within his power, by virtue of defendant's alleged violation of the Sherman Law.

Point III.

(6) Whether it was not highly prejudicial in attempting to show plaintiff's actual bottling costs in Dallas, Texas, to admit evidence as to the cost of obtaining bottled milk from Kansas City, Missouri, although no milk was ever bought from Kansas City.

Point IV.

(7) Whether damages for conspiracy to breach a contract terminable at the end of any six months' period should be computed for a longer period than the six months for which defendant was bound.

STATUTE INVOLVED

The statute involved is set out in Appendix D (*infra*, pages 51, 52), being Sections 1, 2 and 15 of the Sherman Act.

STATEMENT

On July 13, 1956, defendant entered into a contract (R. 135, *et seq.*), whereby defendant was to sell **bottled milk** to plaintiff. Defendant is a Texas corporation, a

cooperative milk association consisting of about 2,500 farmers organized and doing business under the laws of Texas. It controlled about 85% of the raw milk in the Dallas area. Plaintiff is an individual living in Texas.

It is not clear when the contract was to become effective, since it has no stipulation in this regard. In any event, both parties proceeded to make preparation for its execution. Defendant purchased about $20,000.00 worth of equipment for bottling and plaintiff purchased a truck and made inquiries regarding permits, sales routes, etc. On October 15, 1956, plaintiff caused to be created a corporation known as Jere Dairy, Inc., which corporation was controlled by him and his family, all as contemplated in the basic contract between defendant and plaintiff (R. 141). Shortly after November 3, 1956, when plaintiff claimed he was advised by defendant that it would not go forward with the bottling contract, plaintiff made arrangements to go into the bottling business himself through the corporation already in existence (R. 264). He leased the necessary quarters, remodeled it for a bottling plant, bought equipment and took the other necessary steps to pasteurize and bottle milk in glass gallon containers for sale to the public in the Dallas-Fort Worth area (R. 264, 268, 269, 270). This business was opened on April 26, 1957 (R. 270), and since that time plaintiff has been in complete charge of this highly successful bottling business (R. 271). As of the time of trial, about four years later, he was selling over a million pounds of raw milk per month (R. 359). In setting up these operations, plaintiff had, at all times, the full cooperation of the defendant, who assisted plaintiff in setting up his processing plant, recommended the plant site, sold plaintiff raw milk in bulk on the same terms and conditions as defendant sold to every other handler (R. 359, 360, 361, 482, 483, 486).

On January 21, 1957, plaintiff filed suit against this same defendant in the State Court in Dallas, alleging breach of the bottling contract and claiming $12,000.00 consisting of $10,000.00 damages for breach of contract and return of a $2,000.00 deposit (R. 378 *et seq.*). On December 2, 1958, the instant suit was filed, alleging for the first time a conspiracy to breach the same contract and claiming a Sherman Act violation (R. 1). Plaintiff's theory for the present suit is that defendant's alleged breach of contract was the result of pressure from other milk handlers in the Dallas area who agreed on November 2, 1956 to a voluntary price increase of about one cent a quart in favor of defendant, conditioned on defendant's refusal to bottle milk for plaintiff (R. 122). Defendant denied the existence of any such conspiracy and claimed that the price increase was wholly coincidental, being necessitated by a severe drought which had caused serious financial setbacks to the farmers composing defendant association. The existence of the drought was not denied but the jury found the conspiracy to have existed and the existence of the conspiracy is assumed for purposes of this petition as it was in the Court of Appeals. The jury awarded plaintiff damages in the amount of $100,000.00, which were trebled by the Court, to which were added attorneys' fees and judgment with interest was rendered accordingly. From this judgment, North Texas appealed unsuccessfully to the United States Court of Appeals for the Fifth Circuit, and now prosecutes this application for Writ of Certiorari.

ARGUMENT

I.

There Has Been No Violation of the Sherman Law

Defendant urged below in both Courts, and urges here, that the breach of its contract to bottle milk for plaintiff did not give rise to an action under the Sherman Law, but merely to an action for simple breach of contract, which action by plaintiff is presently pending in the State Court. In support of this argument, defendant submits the following:

Defendant alleged monopolist contracted to bottle milk for plaintiff at 60¢ per hundred weight. Defendant bottled for no other customer. On protest from defendant's other customers, defendant refused to carry out its contract to bottle for plaintiff. It was still ready to deliver milk in bulk to plaintiff on the same terms and conditions as to other customers (and did so in fact deliver milk during most of the period for which damages were awarded) but refused to bottle for plaintiff. In other words, it refused to perform a service for plaintiff over and beyond the service performed for its other customers. What makes the result reached by the lower Courts truly astonishing is the fact that the contract breached would have been, according to those Courts' holdings, a direct subsidy to the plaintiff by defendant over and above defendant's other customers.

The essence of the complaint is breach of contract to bottle milk at 60¢ per hundredweight. The critical question is whether this amount is above or below the bottling cost to the plaintiff since plaintiff, upon defendant's breach of the contract, undertook the bottling operation on his own. If 60¢ is above the cost to plaintiff, clearly

the plaintiff has sustained no damage. If 60¢ is below the cost to the plaintiff, as determined by the lower Courts, clearly the contract discriminates against every other customer of defendant since no other customer had such a subsidy. To carry out such a contract would have been a sure and certain violation of the Antitrust Laws. **The books are full of cases where Antitrust plaintiffs complain they are not getting equal treatment, but no others we know of where the complaint is failure to receive preferential treatment.**

The reply in the opinion of the Court below to this argument is found in Appendix A, pp. 29 and 30, where the Court says:

> "Counsel for North Texas, both in oral argument and in supplemental reply brief, lay great emphasis on the assertion that Young was entitled only to that degree of fair and equal treatment owed by North Texas, the alleged monopolist, to the general public. While the announced principle may be true, it is translated by counsel for North Texas to mean that Young was seeking some special privilege or advantage *not available* to his competitors; and thus it is claimed, Young was not seeking equal treatment.
>
> * * * * *
>
> Factually, it is difficult to conceive how it may be logically argued that Young was seeking some special privilege or advantage *not available* to his competitors."

To analyze the Court's statement, let us review the undisputed facts:

1. Defendant was at all times ready and willing to sell milk to plaintiff on the same basis on which defendant sold to all its other customers.

2. The contract which defendant made to bottle milk for plaintiff was at a price which the Court found to be less than that at which plaintiff could bottle milk for himself.

3. Defendant had no such bottling contract with any other customer except plaintiff.[1]

4. Defendant's other customers protested this bottling contract which was a direct subsidy to plaintiff.

5. At the behest of its other customers, defendant refused to bottle for plaintiff but did deliver plaintiff bulk milk just as to every other customer.

On these facts, plaintiff would have received treatment different from and more favorable than that received by his competitors had the contract been carried out. He alone would have had his product packaged and he alone would have had it done below cost.

The Court below purports to avoid this result by speculating that other customers of plaintiff might also

[1] "Q. (To plaintiff) Subsequent to this dispute concerning this contract, isn't it a fact that you purchased milk from the North Texas Producers Association, raw milk?
A. Yes, sir." (R. 359)

* * * * * *

"Q. Now, during the eighteen months shown on Exhibit 1 that you have purchased raw milk in bulk from the Association, did they cooperate with you in any way that they didn't cooperate with any other handlers, as far as you know?
A. Yes. They standardized milk for me." (R. 360)

* * * * *

"Q. You are aware, aren't you, Mr. Young, that the Association, North Texas Producers Association, is ready, willing and able to sell and supply you raw milk in bulk on the same terms and conditions that they supply every other handler in this area, are you not?
A. Yes, sir.
Q. You know—you know that the Association does not bottle milk for any other handler or other party, don't you?
A. Yes, I think so." (R. 361)

on request, have received contracts to obtain bottled milk. This seems to us to be a complete *non sequitur*. The point is that no other customer had such a contract and until one did plaintiff stood alone. Actually there is not the slightest suggestion in the record that any other customer could have had such a contract or required such a contract; on the contrary, the record shows clearly that every other customer already had made adequate bottling arrangements of his own. But the point is that, since only plaintiff had such a contract, breach of the contract did not deny plaintiff equal treatment, but put him on the same basis as everyone else.

Even if we accept the Appellate Court's speculation and agree that others might have obtained bottling contracts, surely there is nothing in the record to indicate that their contracts would have been carried out although plaintiff's contract was breached or that plaintiff's contract would have been breached under such circumstances. Where, we respectfully ask, is there a failure to accord plaintiff "that degree of fair and equal treatment owed * * * to the general public?" He got what everyone else got. Not bottling, but then no one else did either!

Of course, defendant's fundamental position is that, while there is an antitrust obligation to deliver milk in bulk to plaintiff and others, there is no antitrust obligation to bottle milk, and breach of a contract to bottle milk, whether resulting from a conspiracy or otherwise, gives rise only to an action for simple breach of contract. The fact that the bottling contract subsidized plaintiff is merely an added reason for refusal to carry out the contract. Such a subsidy would have violated not only the antitrust laws, but would surely have been an illegal method of evading the Federal price orders in force in the Dallas area.

II.

Plaintiff Should Not Have Been Excused from Proving Damages Reliably, When This Was Clearly Within His Power

Plaintiff's basis for damages for breach of the contract to bottle milk is plainly the difference between the contract cost and his actual bottling cost while operating as Jere Dairy, Inc. The contract cost is, of course, specified. Plaintiff never did show his actual bottling cost but was relieved from that responsibility by the Court below with the statembent (App. A, p. 36):

> "The wrong done to Young was a tort and the wrong itself was of such a nature as to render it virtually impossible to prove the amount of damages with positive certainty and precision."

How the breach of contract to deliver bottled milk prevented plaintiff from showing his actual cost of bottling is not mentioned by the Court. In point of fact, plaintiff, a highly successful businessman, had about four years of experience in bottling on his own account. There is no reason in justice or in equity why he should not have demonstrated to the Court and the jury what his bottling costs were. Under the circumstances, it is absolutely impossible to tell whether his cost was above the contract price, below the contract price, or equal to the contract price. When asked for this information on cross examination he blamed his accountant for his inability to come up with this figure (R. 368).

III.

Admitting the Kansas City Bid Price Evidence Was Highly Prejudicial Error.

Plaintiff, in an effort to show substantial damages, offered in evidence the cost of obtaining bottled milk

from Kansas City, Missouri. This was done over the strenuous objection of defendant. The highly prejudicial nature of this evidence is shown by the exhibits themselves from which the jury could have concluded that plaintiff had sustained damages of about $100,000.00 a year for four years.

No milk was ever obtained by plaintiff, or plaintiff's corporation, from Kansas City. The sole effect of this evidence was to completely confuse the jury as to plaintiff's actual damages. To emphasize the ridiculous nature of this evidence, we point out that the Kansas City price for bottling for plaintiff was $2.70 over the Class I milk price. Of this amount $1.75 was to cover transportation costs for the round trip haul from Kansas City to Dallas.

We respectfully ask the Court if there can be any reason why the introduction of this evidence, wholly unnecessary and unjustified, was not seriously prejudicial.

Compare the punctilious care which Judge Friendly took to prevent inflaming a jury in a treble damage case in *Schwabe v. United Shoe Machinery*, 297 F. 2d 906 (C.C.A. 2, 1962).

That Court said at page 912:

> "There is no bright line that divides evidence worthy of consideration by a jury, although subject to heavy counter-attack, from evidence that is not. Especially because of the guaranty of the Seventh Amendment, a federal court must be exceedingly careful not to set the threshold to the jury room too high. Yet it is the jury system itself that requires the common law judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning * * * to exclude matter which does not rise to a clearly sufficient degree of value'; 'something more than

> a minimum of probative value' is required. 1 Wigmore, Evidence (3d ed., 1940) pp. 409-410. These comments are especially pertinent to an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it. It might indeed have been possible for a judge, with days in which to study the exhibits of plaintiff's expert, to come up with some rational computation of damages, on a theory wholly different from what the expert advocated, that would satisfy the Supreme Court's modest requirements in this area: it would be foolhardy to expect a jury to do so. 'When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out,' Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 26, 78 L. Ed. 196 (1933)."

Humbly and urgently we request this Court to look at Exhibits P-27 and P-28 (Appendix E, *infra*, pp. 55-58), to see whether they have any place whatsoever in this lawsuit. Any examination at all will show that they are wholly out of place and could not have failed to give the bewildered jury a completely misleading impression of quantum and of what constitutes proper proof.

IV.

Plaintiff Should not have been Held Liable for Damages beyond the Contractual Period of Six Months

The Trial Court and the Appellate Court allowed damages for a period from the time of the alleged breach of contract in November of 1956 to the date of trial, February 20, 1961. As shown by the Statement of Facts, plaintiff commenced business in April of 1957 and operated very successfully with the full cooperation of defendant from that time until the time of trial. Plaintiff's basis for claiming such an extended period of damages

was the five-year term of the contract. Said contract provided, however (R. 141):

> "In any event, with or without cause, either party hereto shall have the right to cancel this contract by giving the other party six months' advance written notice of such cancellation and termination."

It is apparently plaintiff's position, in which the lower courts presumably concurred, that since no written notice of cancellation was ever given, damages should run for the entire term of the contract up to the time of trial. This position is completely inconsistent with the fact that plaintiff also contends that defendant anticipatorily breached the contract. Plaintiff filed his State suit for anticipatory breach of contract on January 21, 1957 alleging in his petition (R. 380) " * * * on the 3rd day of November 1956 the Defendant Association, acting by and through its Manager, J. O. Woodman, informed Plaintiff that Defendant no longer was willing to be bound by the terms of the contract, that it would not be bound thereby, and that Defendant was as of said time breaching the contract, the Defendant thereby anticipatorily breached said contract by virtue of said breach of contract. Plaintiff suffered damages * * * " In the light of this allegation that plaintiff had actual notice of the alleged breach of contract in November of 1956, it would certainly have been a vain and useless thing for defendant to serve a written notice of cancellation by the exercise of its six months' option.

Stated in other terms, we submit that the law is clear, especially in an action for anticipatory breach, that damages can be recovered by either party solely for the term pursuant to which the other party was absolutely bound to the contract. We believe the authorities on this

point are almost too numerous and too elementary for citation. For the convenience of the Court, we list some of the cases enforcing this doctrine:

Stolz v. Wells, 43 S.W. 2d 163 (Tex. Civ. App. 1931); *City of San Antonio v. Condie*, 329 S.W. 2d 947 (Tex. Civ. App. 1959); *In re Petroleum Carriers Co.*, 121 F. Supp. 520 (D.C. Minn. 1954); *Chevrolet Motor Co. v. McCullough Motor Co.*, 6 F. 2d 212 (C.C.A. 9, 1925); *Pecarovich v. Becker*, 248 P. 2d 123 (Cal. App., 1952); *Derry v. Board of Education*, 108 Mich. 631, 61 N.W. 61 (1894); *Louisiana Oil Corp. v. Bryan*, 165 Miss. 157, 147 So. 324 (1933); *Tousley v. Atlantic City Ambassador Hotel Corp.*, 25 N.J. Misc. 88, 50 A. 2d 472 (1947); *Watson v. Russell*, 149 N.Y. 381, 44 N.E. 161 (1896); *Bitterman v. Gluck*, 256 Appellate Div. 336, 9 N.Y. Supp. 2d 1007 (1939); *Frieburger v. Texas Co.*, 216 Wisc. 546, 257 N.W. 592 (1934); *Fife v. Great Atlantic & Pacific Tea Co.*, 166 Pa. Sup. Ct. 77, 70 A. 2d 369 (1950).

This same principle of law has been afforded recognition in antitrust litigation in *Alexander v. The Texas Company*, 149 F. Supp. 37, 165 F. Supp. 53 (W.D. La. 1958), wherein the Court stated at 149 F. Supp. 44:

> **"Finally, plaintiff has not alleged any recoverable damage proximately resulting from this alleged antitrust violation. The damages he claims, as shown by his deposition, are computed on the basis of alleged profits he anticipated realizing through continued operation of the service station over a three-year period. Necessarily, this assumes a legal right which did not exist, for by the terms of the lease defendant legally could have cancelled it at the end of any lease-year, as was done. Consequently, the damages he claims for this are purely speculative and are not founded upon any enforceable right."** (Emphasis added).

The Appellate Court here did not discuss the period for which damages were allowable, except to say as to defendant's position (App. A, p. 37):

"These contentions are rejected."

No reference was made to the only prior antitrust case on the subject, squarely in conflict with this holding, being *Alexander v. The Texas Company, supra.*

Under the decision of the Fifth Circuit, there is no determination whatsoever as to the period of defendant's liability. Was it the contract period? The Court rejected this. The conspiracy period? The Court rejected this. One year, two years, five years, one hundred years? Surely, there must be some limit on defendant's liability, but neither of the lower courts has so indicated.

CONCLUSION

I.

The present case represents an extension of private antitrust litigation far beyond any limits heretofore noted. In substance, the lower courts have said that, where a conspiracy between an alleged monopolist and one or more customers to breach a contract exists, there is necessarily a violation of the Sherman Law irrespective of what the contract provides or the effect of its breach. Such a doctrine would truly open the floodgates of treble damage litigation. Granted that the jury found a conspiracy to exist, it is surely material that the contract so breached was a contract to perform a service in no way related to the antitrust laws, but rather a service which, if carried out, would have given plaintiff an undue preference over every other customer of defendant.

II.

There is no justification for plaintiff's failure to prove his actual bottling costs and the assumption of the

Courts below, that damage flowed from the breach of the contract, is a wholly unjustified assumption and an extension of the rules for proof of damages in private antitrust litigation far beyond any limits heretofore set. Such an extension should not be permitted to serve as a precedent in other cases. It is one thing to excuse a plaintiff who cannot prove his damages because of defendant's actions, but entirely different to excuse one who can but will not.

III.

The admission of the Kansas City Bid Price evidence was a flagrant error, highly inflammatory and prejudicial, and in direct conflict with the rule laid down by the Second Circuit Court of Appeals in *Schwabe v. United Shoe Machinery*, 297 F. 2d 906, 912.

IV.

The applicable term for allowance of damages under the circumstances here involved has never been passed on by this Court. It should be, particularly since the only two cases on the point are conflicting.

Respectfully submitted,

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